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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 705

FRANK RIGGALL, *Petitioner*

v.

WASHINGTON COUNTY MEDICAL SOCIETY; STANLEY APPLEGATE, Individually and as President of Washington County Medical Society; FOUNT RICHARDSON; FRIEDMAN SISCO; RUTH ELIAS LESH; and ALFRED HATHCOCK, *Respondents*

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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### OPINION BELOW

The opinion of the United States Court of Appeals for the 8th Circuit, is not yet officially reported, but is found in the appendix to the petition.

### JURISDICTION

The Petitioner seeks to review the action of the United States Court of Appeals for the 8th Circuit, in affirming a decree of the United States District Court for the Western District of Arkansas, dismissing Petitioner's Complaint.

## QUESTIONS PRESENTED

I

Whether the decision of the United States Court of Appeals is in conflict with the decision of the United States Court of Appeals for the District of Columbia in *American Medical Association* v. *United States*, 130 F. 2nd 233.

II

Whether the decision of the United States Court of Appeals in this case is in conflict with prior decisions of this Honorable Court.

## STATUTES INVOLVED

The statutory provisions involved are the Sherman Anti-Trust Act, 15 U.S.C., Sections 1, 2, 12 and 15.

## STATEMENT

Dr. Frank Riggall is a practicing physician residing in the town of Prairie Grove, Arkansas; a town of 939 inhabitants, located in Washington County, Arkansas. He has resided and has practiced medicine in Prairie Grove since 1923; under a regular license since 1935. On September 27, 1956, he applied to the Washington County Medical Society for membership in that society. His application was received and submitted to the membership of the society in accordance with its Constitution and By-Laws which provide that the society shall be the judge of the qualifications of its members. His application for membership was rejected by secret ballot by a vote of 34 against and two for admission. This application was the fourth made by appellant, he having applied in 1935, and in 1947, and in 1954, all three times being rejected by the society. In an effort to compel his acceptance into membership in the county society, appellant instituted

action against the Washington County Medical Society and five of its members, alleging a violation on their part of Sections 1 and 2 of the Sherman Anti-Trust Act. The complaint was rather prolix, but stripped of its verbiage, it was essentially a complaint based upon allegations of loss of economic benefit and prestige to the appellant individually because he had not been accepted by the membership of the county society. As a basis for Federal Court jurisdiction, appellant alleged that he treats and administers to patients from other states and further if granted membership in the Washington County Medical Society, he would ultimately receive membership in the American Medical Association; that because of his superior ability and "international recognition", he would achieve wide-spread notoriety and as a result a great many persons from other sections in the United States would come to him for medical treatment and services. He further alleged that because of his superior talents in the various fields of medicine, he would be consulted by physicians from other States who would refer their patients to him for treatment and medical services. This, appellant contends, brings the case under the Sherman Anti-Trust Act. In short, appellant's position as set out in his complaint, was that denial to him of membership in the local county society constitutes a burden on interstate commerce between the State of Arkansas and other states.

Appellant listed in his complaint a great number of personal honors which he says should properly be his due to his unusual talents. The principal legal claim of Federal jurisdiction, however, was based upon his assertion that his skill and talents cannot be properly appreciated nor publicly known and brought to the attention of both physician and laity (which would immediately bring to him economic benefit and personal prestige)

unless he can say that he is a member of the local medical society.

Appellees plead to the jurisdiction of the District Court, their contentions being briefly these:

1. That appellant is simply a local physician, notwithstanding extravagant claims, practicing in Prairie Grove, Arkansas, and that the fact that he may have treated patients who live or have lived in other states does not constitute his practicing medicine in interstate commerce as that term is used and intended in Section 1 of the Sherman Act.

2. That the practice of medicine in Prairie Grove, Arkansas, is wholly local in character and the practice of medicine being one of the learned professions; it cannot be properly classified as "trade" or "commerce" under Section 1 of the Sherman Act.

3. That Section 1 of the Sherman Act was intended to protect the public from price fixing and price maintenance and that no allegation is made in the complaint that any of the acts of the defendants have resulted in or intended to control prices or fees for profesisonal services in Washington County, Arkansas, or any other place.

4 That the essential purpose of the appellant's complaint as reflected by his prayer, was to compel his admission into membership of the Washington County Medical Society and that the Court has steadfastly refused to assume control of the admissions or rejections to memberships in professional societies or clubs.

The District Court adopted the Contentions of Appellees and dismissed the Complaint.

On appeal to the United States Court of Appeals for the Eighth Circuit that Court, on November 15, 1957, en-

tered judgment affirming the judgment of the District Court.

## Point I

### *There Is No Conflict Between the Decision in This Case and the Decision of the United States Court of Appeals for the District of Columbia in American Medical Association v. United States, 130 F. 2nd 233.*

The petitioner asserts as a reason for the granting of a writ of certiorari by this Court that the decision in the present case is in conflict with the decision of the United States Court of Appeals for the District of Columbia, in *American Medical Association* v. *United States*, 130 F. 2nd 233. Such assertion is clearly erroneous. There is no conflict in the two decisions as indicated by the language used by both of the courts. The present case arose under an alleged violation of Section 1 of the Sherman Act and was so considered by the Court below. In its decision, the Court said:

> "Section 3 of the Sherman Anti-Trust Act is confined in its operation to territories or the District of Columbia and has no bearing on the issues here presented."

In the American Medical Association case, the Court was not considering Section 1 and no question of Interstate Commerce was involved. On page 241 of the decision, the Court stated:

> "And, as the prosecution in the present case is under Section 3 of the Act no question of the interstate character of that trade or commerce is involved."

In the present case, one of the principal grounds for the holding of the Court below was that there was no allegation in the complaint to sustain an argument that any

of the acts of the defendants cast any burden on interstate commerce. In its decision, the Court said:

> "It is to be noted that the complaint is confined to plaintiff's private medical practice. It charges no economic burden on the public by reason of the alleged acts of the defendants. There is no charge that the rejection of plaintiff's application for membership in the Washington County Medical Society resulted in the raising or fixing of fees charged the public by other physicians. There is no allegation in the complaint remotely suggesting that the acts of defendants cast any burden upon interstate commerce."

And, further, in the decision the Court pointed out:

> "The practice of his profession as disclosed by the allegations of his complaint is neither trade nor commerce within Section 1 of the Sherman Anti-Trust Act, nor are there any allegations in the complaint indicating that the actions of defendants here complained of resulted in a monopoly within the provisions of Section 2 of the Act."

Further, the American Medical Association case was based upon a conspiracy, the purpose of which was to restrain competition, raise prices or otherwise control the market. On page 238 of the decision, the Court stated:

> "So far as Group Health and the Hospitals are concerned, therefore, their activities are properly described as business and commercial in character. There is also no question that commercial and business competition was not only the possible but the probable result of Group Health's activities. Consequently—entirely apart from any direct restraint upon the practice of medicine itself—if a conspiracy was shown, the purpose of which was to restrain competition, raise prices, or otherwise control the market to the detriment of purchasers or consumers of medical or hospital services, by de-

> stroying or injuring Group Health Association, it was sufficient to sustain the conviction."

In the present case, the Court below specifically found that there was no economic injury to the general public alleged, but that this was purely a case involving a private party's desire for greater profits in his practice. The Court said:

> "Plaintiff has not been prevented from practicing his profession, but in the final analysis his complaint is that he could practice it more profitably but for the acts of the defendants. The Sherman Anti-Trust Act was not primarily to protect the individual but to protect the general public economically, and a private party may not recover under the act unless there has been an injury to the general public economically."

This Honorable Court has recognized the difference between the application of Section 3 of the Sherman Act and Section 1 of that Act. Its language in the following cases clearly points out the distinction between the application of the two sections and makes it quite evident and apparent that there is no conflict between the decisions here under consideration:

*American Medical Association* v. *United States*,
317 U.S. 519, 87 L. Ed. 434;

*United States* v. *Oregon Medical Society*,
343 U.S. 326, 96 L. Ed. 978; and

*United States* v. *National Association of Real Estate Boards*,
339 U.S. 485, 94 L. Ed. 1007.

## Point II

*There Is No Conflict Between the Decision in This Case and the Decisions of This Honorable Court*

The Petitioner argues that the decision of the Court below, that a private party may not recover under Section 1 of the Sherman Act unless there has been an injury to the general public economically, is contrary to the decisions of this Court in *Radovich* v. *National Football League*, 352 U.S. 445, 1 L. Ed. 456; *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 94 L. Ed. 1007; and *Times-Picayune Publishing Company* v. *United States*, 345 U.S. 694, 97 L. Ed. 1277. The Petitioner argues that the Radovich decision changed the rule announced in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 84 L. Ed. 1311, and that under the Radovich decision it is not necessary that the prohibited activities tend to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services. The rationale of his argument is that the Sherman Act irrespective of the amount of interstate commerce affected, now is applicable to instances of private injury without regard to the economic effect upon the general public. Radovich simply did not so hold.

Radovich involved an allegation of conspiracy to monopolize and control organized football, a multi-state industry. The allegations were that the purpose of the conspiracy was to "control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States". Involved also was the transmission of games over radio and television "into nearly every State of the Union". The playing of the exhibitions themselves "is essential to the interstate transmission by broadcasting and television and the actions of

the respondents against Radovich were necesarily related to these interstate activities".

The case involved complete market control of the football business on a mass interstate level.

There was no language contained in the decision on which to base an argument that the requirements of (1) substantial interstate activity; and (2) market control to the injury of the public, were eliminated from the application of Section 1 of the Sherman Act. The case did hold that where there was a volume of interstate business which resulted in market control to the injury of the general public, a member of that general public adversely affected could seek legal relief. It did not remotely suggest that relief under Section 1 of the Sherman Act was available in instances of private injury by activities directed at one particular individual in an intrastate activity and in which the public suffered no injury and was not concerned economically.

Furthemore, in its opinion, this Court cited the Apex Hoisery case with approval and cited as authority for its holding the specific language which petitioner now asserts has been abrogated by the Radovich decision. In footnote 10 in the opinion, the Court says:

> "10. In *Apex Hosiery Co.* v. *Leader*, 310 US 469, 84 L. Ed. 1311, 60 S. Ct. 982, 128 ALR 1044 (1940), this Court said: 'The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.'"

*National Association Real Estate Boards, supra,* is likewise cited by Petitioner as authority for his contention. That case was essentially a price fixing case involving complete market control of the real estate business in the District of Columbia. It arose under Section 3 of the Sherman Act. Mr. Justice Douglas in the opinion states:

> "The core of the case is the charge that the members of the Washington Real Estate Board combined and conspired to fix the Commission rates for their services when acting as brokers in the sale, exchange, lease and management of real property in the District of Columbia."

He also cites the *Apex Hosiery Co.* case as containing the correct statement of the purposes of the Sherman Act, saying:

> "The Act was aimed at combinations organized and directed at control of the market by suppression of competition in the marketing of goods and services."

*Times-Picayune Pulishing Company* v. *U. S., supra,* also cited by Petitioner, involved an allegedly illegal trying arrangement in an effort to control the prices of advertising to the detriment of the general public. Relief was denied because the company did not occupy a dominant position in the newspaper advertising market in New Orleans. The Court found no "unreasonable restraint on interstate commerce" and consequently Section 1 of the Sherman Act had no application.

## CONCLUSION

The Petitioner has presented no case of conflict between the decisions of the Circuit Courts of Appeals. He has alleged no injury to the public nor has he shown any burden or restraint upon interstate commerce. He simply presents a question of whether the Federal Courts under the Sherman Act will review the action of the members of a local medical society in voting not to admit a local physician into membership. His complaint reflects that his right to practice medicine remains untouched. Indeed from the allegations of his complaint and his statement, his practice is and has flourished without membership in the local society. He makes no allegation of price control nor does he allege that the public is affected by the acts herein complained of.

It is respectfully submited that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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